Volume 29 DECEMBER, 1945 Number 4

Journal *of the* American Judicature Society

THE CITIZEN AS A JUROR
JOHN H. FLANIGAN

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Permission is hereby given to reprint, with credit, from this or any other issue.

JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Vol. 29, No. 4 GLENN R. WINTERS, Editor December, 1945

The Citizen as a Juror

JOHN H. FLANIGAN

I AM A JUROR.

I am a seeker after truth.

I must listen carefully and with concentration to all the evidence.

I must heed and follow the instructions of the Court.

I must respectfully and attentively follow the arguments of the lawyers, dispassionately seeking to find and follow the silver thread of truth through their conflicting assertions.

I must lay aside all bias and prejudice.

I must be led by my intelligence and not by my emotions.

I must respect the opinions of my fellow jurors, as they must respect mine, and in a spirit of tolerance and understanding must endeavor to bring the deliberations of the whole jury to agreement upon a verdict;—but

I must never assent to a verdict which violates the instructions of the Court or which finds as a fact that which, under the evidence and in my conscience, I believe to be untrue.

In fine, I must apply the Golden Rule by putting myself impartially in the place of the plaintiff and of the defendant, remembering that although I am a juror today passing upon the rights of others, tomorrow I may be a litigant whose rights other jurors shall pass upon.

My verdict must do justice, for what is just is "true and righteous altogether"; and when my term of jury service is ended, I must leave it with my citizenship unsullied and my conscience clear.

Prize-winning essay in the 1944-45 contest of the Committee on American Citizenship of the American Bar Association.

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Thoughts on Federal Judicial Appointments

EDITORIAL

AMONG THE MANY editorial comments on President Truman's appointment of Senator Harold H. Burton to the United States Supreme Court was the following from the *New York Times:*

"If any criticism can be made of the nomination, it lies in the fact that Mr. Burton's active and distinguished career lacks experience as a judge. The senator from Ohio has been a practicing lawyer, a soldier, a useful member of a state legislature, and a successful mayor of a great city, but he has never sat on the bench. There was a time when wide experience in this respect was regarded as the first prerequisite for a nomination to the Supreme Court. But Mr. Roosevelt, who had an opportunity to appoint no fewer than eight members to the nation's highest court, and who never in any single instance chose as his candidate a judge with long experience on the bench, led us away from that old-fashioned practice. The result is not a happy one, since it deprives the court of experience it should have, and since it fails to reward, as they deserve to be rewarded, circuit and district judges who have made outstanding records."

That the *Times* meant no personal reflection upon the new justice is evident from the opening sentences of the quotation, as well as the highly commendatory succeeding paragraph of the editorial. It is unfortunate that appointing policies cannot be discussed without reference to appointees, since any of the distinguished men who have sat upon the nation's supreme bench have without question been men of learning and integrity, able and willing to serve their country to the best of their ability in whatever capacity they were called upon to do so. With reservations, therefore, of sincere respect to the individuals who have been appointed to the court, we think it not out of order, apropos of the *Times* editorial, to mention what a hasty survey of *Who's Who in America* discloses with regard to the prior judicial experience of the nine men presently constituting our nation's highest court of justice.

Their total prior judicial experience, so far as the trial of civil cases is concerned, is zero. Their total judicial experience otherwise is twelve and one-half years. Six of the nine justices had never been a judge prior to appointment to what ought to be the greatest judicial tribunal in the world. Of the other three, Justice Black spent eighteen months as a police judge, Justice Murphy seven years as a judge of the Detroit Recorder's Court, the jurisdiction of which is limited to criminal cases, and Justice Rutledge four years as judge of the Court of Appeals of the District of Columbia.

Even counting their years of service on the Supreme Court itself, the judicial experience of its present members is not impressive. Excluding the Chief Justice, who has proven his judicial ability in twenty years of brilliant service on the court, its members average less than five years in office. Justice Black, whose appointment was so recent that the memory of it is still very fresh, is second in seniority to the Chief Justice, with eight years on the court. Following him are Justice Reed with seven years, Justices Frankfurter and Douglas with six years, Justice Murphy with five, Justice Jackson with four, Justice Rutledge with two, and Justice Burton, just appointed, with none. The average is less than five years. Adding in the prior experience of Justices Rutledge, Black and Murphy, the average is just about six years, and counting the Chief Justice's twenty years, the average for the whole court is a little over eight years.

There is a limit to the inferences that may validly be drawn from these figures. We would not be understood as implying that any particular appointment should not have been made solely on this ground. Such a rule in effect from the beginning would have deprived the court of some of its leading judges. Mr. Justice Brandeis, for example, came to the court without prior judicial experience. So did the present Chief Justice. The Supreme Court and the body of United States law would have been impoverished without the contributions of these two able jurists and others of their kind. In

the case of Brandeis, long years at the bar had supplied acquaintance and facility with the law. In the case of Mr. Chief Justice Stone, more than twenty years in the teaching of law served the same purpose. Of the present members of the Court, Justices Jackson, Burton, Black and Reed came to the court with a record of two decades or more at the bar, and Justices Frankfurter, Douglas and Rutledge, and Chief Justice Stone, with extended law school experience. Mr. Justice Murphy's non-political experience was about equally divided among law practice, law teaching and service on the bench.

Prior training and experience along these lines is of great value, and has been sufficient to produce distinguished and able judges in many instances. Indeed, without considerable experience in dealing with legal subjects any man would be helpless when he first ascended the bench. In some parts of Europe, law students make a choice between the career of a judge and that of an advocate while still in law school, and those who choose the former proceed at once into their chosen field, but their legal education is directed to that end, and carefully planned apprenticeship procedures assure that they do not hear and decide cases on their own responsibility until fully qualified by both training and experience to do so. The American system makes no such provision. It assumes that all law graduates will become advocates, and our judges are recruited from among those members of the bar who are attracted to the bench for one reason or another.

The fact that our judges regularly come from the ranks of the practicing lawyers, and more rarely from the law school faculties, should not be interpreted to mean, however, that there is no place in our system for judicial apprenticeship. There are many different kinds and grades of courts in our land, from the rural justice of the peace to the august tribunal in Washington. Each, in its own field, is as important as the others in theirs, and the so-called minor courts are in some ways the most important of all. Their importance in the broad pattern of administering equal justice to all is not paralleled, however, by the degree of judicial ability required to make proper disposition of the cases that come before them. Intricate and important questions of law have arisen in minor courts, to be sure, and on occasion they have found their way up the appellate ladder to the court of last resort. The great bulk of cases in the minor courts, however, rest upon more or less familiar, well-established legal principles. Some training in the law is necessary, of course, even to deal with this type of cases, and any court dispensing justice according to law deserves a judge trained in the law. It is not an unfair generalization, however, to say that there is in the ascending scale of courts an ascending scale of difficulty and importance of legal problems encountered, and a corresponding ascending scale of judicial ability required to cope with them.

That the judicial ability thus referred to is a different entity from skill at the bar is a proposition with which few will quarrel. The two are, in a way, the antithesis of each other. The summit of the advocate's skill is to build up the arguments for the one side and to overwhelm those for the other side so convincingly that the one side prevails. The summit of judicial skill is to weigh the two so evenly and impartially that even though the preponderance of the one over the other be but as the weight of the peppercorn, the decision will surely go that way. Granting an equal acquaintance with and love of the law, the difference between these two opposing points of view is the difference between the successful lawyer and the successful judge, and, we submit, the transition from the one to the other after say twenty years can hardly be accomplished overnight.

In these modern days there is a further reason why prior judicial experience on a lower court is preferable to the practice of law as preparation for ascension to the highest judicial post in our country. That is the tendency of prominent lawyers to specialize in their practice. A lawyer who has spent the major portion of his professional career as a specialist in corporation or labor law, or in government legal posts, is surely not as well fitted to sit in judgment upon the run-of-the-mine legal problems that come before a court as is a man who has spent the previous twenty years doing exactly that in another court.

Not only for the sake of its effect upon the Supreme Court, but also on all the other courts of the land, a policy of promoting judges from lower to higher judicial positions is to be commended. Everyone knows what a tremendous improvement in the morale of government em-

ployees followed the establishment of civil service and the merit system. Just as every minor league baseball player yearns to play in the world series, so every judge ought to have the right to aspire to sit on the highest bench of his state or nation if he so desires. If diligence and skill in the performance of his present work will have a bearing upon the consideration to be accorded him when a vacancy higher up is to be filled, a powerful inducement to exhibit diligence and skill will exist. That inducement will be conspicuously lacking in the federal judiciary so long as the United States Senate, the federal administrative agencies, and the Department of Justice remain more likely places in which to find future Supreme Court justices than the district courts and the circuit courts of appeals.

Wherever election of judges prevails, of course, there is little chance for the application of these principles. Candidates may get their names on the ballot in a variety of ways, and the voters have little opportunity to pass upon the diligence and judicial ability of the prospective judges they are called upon to choose. It is in the jurisdictions where judges are appointed that we have a right to expect the proper considerations to control in the selection of judges. It is interesting and a bit disturbing, therefore, to observe that the prior judicial experience of the judges elected to the Supreme Court of Michigan, as listed in *Who's Who in America*, averages two years more than that of the judges appointed to the Supreme Court of the United States. Some of these, of course, originally went on the court by interim appointment.

Again we emphasize that this one yardstick is not offered as a single sufficient gauge of the suitability of persons mentioned for appointment to the Supreme Court. Many lower court judges were improvidently chosen themselves, or are able to secure reelection for term after term for other reasons than judicial ability, while as we have said, able judges who have contributed greatly to the distinction of the Supreme Court through the years have not been judges prior to their appointment. It might even be added that some top-flight lawyers of Supreme Court caliber could not be obtained at all if judicial promotions were an invariable rule, since they could never be induced to accept the preliminary lower court assignment. The fact that this important factor has been so persistently ignored, however, raises justifiable doubts as to whether other proper factors, as well as this one, have been given due weight in the consideration of candidates for judicial appointment.

General education and legal education, for example, as evidenced by graduation from college and law school, certainly should be important considerations in the appointment of judges. True, such a standard would have ruled out Abraham Lincoln, who was not a judge but who might very well have been a good one. But while the exception may prove the rule it certainly is not the rule, and for most judges college and law school training would be important assets.

Nine years ago, at the Boston meeting of the American Bar Association, Judge Merrill E. Otis presented some startling figures, likewise culled from the pages of *Who's Who*, showing that of the federal judges appointed by Presidents Harding, Coolidge and Hoover, 40.5 per cent, 36 per cent and 40 per cent, respectively, had both college and law school degrees, while only 17 per cent of those appointed by President Roosevelt up to that time were so qualified. Those figures strongly suggest what we all know to be true, that other factors than the qualifications of the man for the job were often given controlling weight during that administration. We do not have statistics for the remaining nine years of Mr. Roosevelt's presidency, but there is nothing in the record to indicate that they would alter that conclusion. The other factors were, of course, political ones. The objectives of those appointments were to reward service to his party and his administration, to keep in positions of power and influence such men important to his program as the voters from time to time dropped from elective offices, and to assure favorable treatment of his policies so far as possible in the federal courts. It may be assumed that after those objectives were satisfied, consideration was given to securing the best possible men from other standpoints. In the consideration of candidates for appointment, the informed opinion of the candidates' brethren of the profession as indicated by recommendations of bar associations and bar leaders was consistently ignored.

Similar factors may be granted to have had their influence in the appointments of the previous administrations also, but the figures

suggest that personal and professional qualifications figured more prominently then than during the Roosevelt regime.

In defense of Mr. Roosevelt, let it be said that the system is partly if not chiefly responsible. No man rises to the presidency except by putting his all into the game of politics and winning. If he continues in that office, he does so by playing his cards so skillfully that his party remains in power and he remains at the head of the party. If the people, through the constitution, put in his hand a high card, we may at least not be surprised if he occasionally uses that card to win a trick that he might otherwise lose.

President Truman has had many compliments on the high quality of his appointments, not only to the judiciary but to various governmental posts, and we gladly join with the *New York Times* in characterizing the newest Supreme Court appointee as a "broad minded and deeply conscientious public servant who has taken the leadership in matters both of great international and great national importance, and who can be counted upon to perform his new duties with energy, skill and devotion to the public interest." However, let us not suppose for an instant that because our Democratic president appointed a Republican instead of a Democrat, the appointment was not a political one. Several prominent and able men were suggested for the post, some of them perhaps less qualified for judicial office than Mr. Burton and others perhaps more so. Just what were the controlling reasons for Mr. Burton's appointment will very properly remain locked in the breasts of Mr. Truman and his advisers, but the public unquestionably believes, and not without reason, that Senator Burton was selected because he was a Republican, politically prominent (a fine man, of course and a good lawyer, who might be expected to do well on the court) and most likely to please the millions of citizens who were chafing at the prospect of a 100 per cent Democratic Supreme Court. Other instances are not wanting of political considerations apparently having been uppermost in the new president's selections, although we reemphasize that his record is good.

The question all this brings up is how to bring into proper balance the various factors so that those tending to elevate the quality of the judiciary and promote the efficient administration of justice will normally control. The American Judicature Society and the American Bar Association have proposed and the State of Missouri has adopted and successfully used a system designed to accomplish that end. The appointing power is lodged in the chief executive, but it is restricted to persons nominated for the purpose by a non-political nominating commission the sole function of which is to see to it that only properly qualified men are considered for the appointment.

It need not be expected that this system will entirely eliminate politics from judicial appointments. Few of the prominent men in public life have not aligned themselves with one or the other of the leading political parties, and right within the panel of nominations it might very well be that a politically-minded governor would choose the one most favorable to his party program without giving a thought to his judicial qualifications. But his omission in that case is relatively unimportant, for somebody else has already attended to that, and no matter what may be the basis of the governor's choice, political, religious, racial or personal, he cannot choose an unqualified or a poorly qualified man.

In this connection it is significant that at the Missouri constitutional convention last year when the enemies of the Non-Partisan Court Plan tried desperately to keep it out of the new constitution, one of their bitterest complaints was that the Republican governor had appointed Republicans to judicial office, but they were obliged to concede that in every instance the appointees were men of the highest personal and professional qualifications.

To be realistic, we must admit that the incorporation of such a system into the federal constitution is not yet this side of the horizon. Before attempting to do so, it would be well to wait for it to be proven by more experience in that state and in other states, and to take advantage of such modifications and improvements as that experience may dictate. In the meantime, is there nothing else that can be done to minimize the political and exalt the professional factors in federal judicial appointments?

There is no reason to suppose in advance, or on the basis of the scant experience of the past six months, that the recommendations of pro-

fessional groups and organizations are to be forever outcast. We propose that the bar of the nation in the case of Supreme Court, Tax Court, Court of Claims, and other courts not restricted to territorial jurisdiction, and the bar of the district or other appropriate locality in the case of other vacancies, assume seriously the responsibility of recommending suitable candidates for appointment. Mayor LaGuardia of New York recently tossed out the challenging remark that the bar has no more right to choose judges than certain other lay organizations. Whether or not there be any merit in that statement, it is irrelevant to the present suggestion because the bar would not be seeking to choose, but only to recommend, and would concede to the war veterans, the women's clubs and the hod carriers' union an equal privilege. The opinion of fellow members of the bar as to the judicial qualifications of a certain lawyer or judge certainly should be and is of greater weight than that of any other body of public opinion. As such, it deserves not only to be declared but to be transmitted promptly to the appointing authority and given wide publicity in the public and professional press.

For maximum effectiveness, the recommendations of the bar should be announced as soon as possible after the vacancy occurs, and should be given as much publicity as possible. One reason Mayor LaGuardia assigned for his low opinion of bar recommendations was that on one occasion he had sought them and they had been delayed several weeks. Not long ago the Columbus Bar Association scheduled a meeting at which it planned to draw up recommendations for the filling of a judicial vacancy in Ohio, and the governor announced his appointment before the meeting was held.

This brings up a suggestion offered by Dean John H. Wigmore a few years ago that the bar not wait until the vacancy occurs to select those it considers suitable for appointment, but that it maintain as a permanent institution a sort of honor roll of men deemed qualified for judicial service. If that list were faithfully kept up to date, adequately published, and above all brought to the attention of the appointing authority as soon as a vacancy occurs, there would be no excuse for the appointment of unqualified men.

No new bar activity is here proposed. For many years local bar associations in numerous cities have endeavored to influence the public vote on judicial elections by means of preferential polls and to assist in the making of interim appointments by means of a list of suggestions such as the Columbus Bar Association had in mind for the recent Ohio vacancy. The experience in Chicago, St. Louis, Cleveland and New York, as well as others that might be mentioned, has been extensive and instructive. So far as we know, nothing of the kind has ever been attempted on other than a local or state-wide scale.

We are now suggesting that every general bar organization, local, district, state and national, undertake through a committee on selection of judges or such other internal machinery as it wishes, to keep close track of judicial vacancies in the territory approximating its own territorial scope, and take prompt and effective action to make the bar's recommendations known to the public and to the appointing officer if selection is by appointment. A state bar association would not normally need to keep watch over local circuit judgeships primarily of concern to city or county bar groups, but would devote its attention to the judges of the state appellate courts and the federal courts in the state. On the other hand, a state association might very well take an interest in appointments to the United States Supreme Court, the Tax Court, the Court of Claims, and other federal tribunals having no local territorial jurisdiction.

The recommendations of those we have mentioned as already active in this field have in many instances been followed—enough to convince generation after generation of bar officials that the effort was sufficiently worth while to be continued. In a great many other instances, however, they have been ignored or scorned. The letters of recommendation that have gone to the President and the Attorney-General in the past from bar sources have always been graciously acknowledged, but the appointments have generally appeared to have been made just about as if the letters had not been received.

So long as the appointing officer is primarily a politician, the best approach toward reapportioning the balance of emphasis between the purely political angles of an appointment (which will always demand their share of attention) and those with which we are concerned, would

seem to be to give if possible a political quality to the latter. That is not an impossibility. Politicians stay in office and in power by means of votes, and votes are or should be responsive to public opinion. To the extent that public opinion is aggressively marshalled not only in favor of good appointments but in condemnation of poor ones, political expediency will dictate that the non-political qualifications of the candidates be considered. It is not inconceivable that public opinion could be sufficiently aroused to make those considerations the controlling ones, as of course they ought to be.

First, let wide publicity be given to the fact that bar recommendations are being made, along with generous discussion and explanation of why they are important. Let there be special publicity for the specific recommendations offered to fill a specific vacancy. A newspaper editor sympathetic with the objectives sought (and most of them are) might in many cases be persuaded to give them publicity roughly comparable to that accorded the final selection. The appointment when made should be publicly compared or contrasted with the recommendations, and praise or blame should be freely bestowed.

There is reason to believe that great good would result from the widespread policy of fair but stern and insistent criticism of second and third-rate appointments. Here is a greatly neglected field. Americans are good sportsmen and good losers, and once a poor appointment has been made we are all strongly inclined to call it water over the dam, turn around and welcome the newcomer and lend him all possible aid and encouragement, and look to the future. That is all well and good and should by all means be done, but there exists in the poor appointment an opportunity through public criticism to bring needed pressure to bear in favor of better appointments in the future. Such a practice will no doubt make the new appointee uncomfortable, but critical comments can usually be phrased with a saving clause to do individual justice to an honest appointee who is in no wise subject to personal censure merely because his talents run more strongly in some other direction, or because some other man happens to be more talented than he. These criticisms should not circulate merely within the profession, but should reach the public and especially those responsible for the appointment. Only in that way can advantage be taken of a poor appointment to apply pressure toward better appointments in the future.

Dean Wigmore's suggestion has already been printed in this JOURNAL, but we are reprinting it in full immediately following this editorial. We are somewhat less optimistic than its author as to the unanimous enthusiasm with which the plan would be received by presidents and particularly by senators, but we think there is in it an original and constructive idea which merits more consideration than it has received in the six years since it was first advanced. We also offer, to round out the discussion, an article on some related phases of the subject by Federal Judge Robert N. Wilkin of Cleveland.

We recently printed in these columns a wise observation from the Mohammedan book of books, the Koran:

"A ruler who appoints any man to office when there is in his dominions another man better qualified for it sins against God and against the State."

That requires the ruler to appoint not the man who will best suit his convenience and whose qualifications are high enough to escape criticism, but the very best man that can be found. In the selection of American judges, is that standard too high?

The conditions in our great urban centers and the economic and political predominance of those centers are making it impossible for tradition and the opinion of the legal profession to keep up the judicial standards which have, on the whole, survived for nearly a century against the pressure of politics. The profession owes it to the law, to the upholding of American institutions, to the public, and to itself, to be active everywhere in urging better provisions for choosing judges and for giving them independence.—*Roscoe Pound.*

A New Way to Nominate Supreme Court Judges

JOHN H. WIGMORE

THE PLAN WHICH I PROPOSE does not concern the electoral mechanism. It precedes that mechanism. It aims to provide an *eligible list*, from which may be selected the names that are to be used by the nominating agency.

[Dean Wigmore discussed various proposed plans for improving the selection of judges, including that devised by Albert M. Kales, endorsed first by the American Judicature Society and later by the American Bar Association and now, since the writing of this article, put into practice in Missouri.]

But all that this type of plan involves is the political and legal mechanism. I propose to go behind that legal mechanism. We naturally ask, *How are these names to be selected by the appointing agency or by the recommending agency?* What I propose is to crystallize professional opinion beforehand—that is, before any vacancy arises, and thus to encourage and to force the nominating agency to limit its selection to an eligible list.

It is in the federal courts that it is most feasible. And it was the situation there which first suggested to me the proposed measure. I need not remind you that the misuse of federal judicial appointments as political rewards is an intolerable practice. It is not a shortcoming peculiarly of this or of any other administration. It has been observable in every administration, at least occasionally. The temptation to that misuse exists alike for the senators and for the executive. The newspaper dispatches of the day show that we are always subject to that danger. The recent Washington dispatches mention, as most probable names for the vacancy left by Mr. Justice Cardozo, two federal senators who wish to be rewarded, and one state governor who needs to be consoled. Think of such appointments to fill the place made honorable by the name of Cardozo! None of these three political candidates may be appointed; but the mere report of their strong candidacy indicates the constant risk.

Now there is no way to limit the executive legally, either in this or any other administration, in his choice. But it is possible to organize the force of public opinion. Yet public opinion in a professional field, like law or medicine or engineering, is naturally ignorant. It needs to be informed, and it wants to be informed. How can that be done? I mean, how can we inform the ten thousand newspapers all over the country of the names and the merits of the persons deemed professionally best qualified for the highest professional offices? Of late years the state bar associations have come to show an extraordinary sense of professional solidarity and responsibility. The growth of that sense in the last decade has been truly amazing. So I propose that we make use of it for the present purpose.

This is how I propose to organize and promulgate professional opinion:

Let each state bar association carry two *Eligible Rolls of Judicial Honor*, one for the federal supreme court, one for the state supreme court. The federal eligible roll will contain two names—one a resident of that state and one a resident of another state. This eligible roll will signify the recommendation of the profession of that state for the next appointment, whenever a vacancy may occur. The eligible roll for the state supreme court will consist of four names, because vacancies occur more frequently than in the federal court. This eligible roll of judcial honor will be carried each year in the printed proceedings of the association. It will be sent by mail to all newspapers and periodicals of national and state circulation. It will thus be kept ready in their editorial offices for reference when a vacancy occurs.

Obviously, when a vacancy occurs in the federal supreme court, the editors will all go to this list. They will there discover not only one name for each state, but many names borne identically on the rolls of several states. These names they will publish and discuss. Gradually, a consensus will develop. Public opinion will virtually say to the executive, "You must limit your choice to this eligible roll of judicial honor."

A president who would be tempted to go out-

Address before the Chicago Bar Association, December 3, 1938. Reprinted from 22 J. Am. Jud. Soc. 207, February, 1939.

side this list and name someone else would find himself flouting public as well as professional opinion. Moreover, he would be assured usually of the support of the senators from the states represented in the honor rolls, for the senators would vie with each other to press up on him the honor names from their respective states. An executive who would nevertheless ignore that roll would be daring indeed. Most presidents would gladly use that roll as a means of solving their problem of choice.

The keynote of this plan, as you see, is the mobilization of public and professional opinion on an eligible list selected before any controversy arises.

The plan could be used in the same way for the state supreme courts.

Many details will of course occur to you as necessary to be worked out. I have in fact worked out those details, but I spare you them at this time. Many doubts, too, will arise in your minds; but I am convinced that they can all be answered.

Now to let you realize what would be the possible effect of such a plan, just imagine that at the present moment all editors and the public were informed that in forty-two states the bar associations were carrying an eligible roll of federal judicial honor, that in thirty-four of those states the names of John Doe appeared, that in twenty-seven of them the name of Richard Roe appeared, and that in twelve of them the name of Robert Robinson appeared. What would be the position of an executive who might be contemplating a choice between two partisan political senators and one partisan political governor not found on any eligible roll of honor?

The Judicial Function and the Need of Professional Selection of Judges

ROBERT N. WILKIN

"Politics touches the judicial office only to cripple and enslave it."

The fundamental error of those who defend an elected or partisan judiciary is that they misconceive the essential function of a court. The purpose of a court is not to give effect to the popular will, but to declare the law. True, the law may be an expression of popular will; but it is an *a priori* declaration, made upon due deliberation. When the court is called upon to give it effect, popular feeling may be at variance with it. Frequently it is the duty of the court to set aside legislation, enacted at the behest of popular feeling, because it is contrary to the fundamental or constitutional law. As Professor Schouler has said:

"Public legislation submits thus to our sober second thought, and the Supreme Court is keeper of the national conscience, the guaranty of minority rights, as it ought to be. For, as Burke has so fitly observed, every government ought in some sort to make a balance of its judicial authority, and give security to its justice against its power."

The author is judge of the United States District Court for the Northern District of Ohio in Cleveland. This article is revised and adapted from one of a series sponsored by the American Bar Association in 1936 as part of the National Bar Program.

The mistake of those who champion the elective or partisan system consists in their carrying over to the problem of judicial selection the democratic principles applied in the election of executive and legislative agents. They fail to keep in mind the difference of functions of the different departments of government. They assume that the same obligation rests upon the judiciary as upon the other branches of government to declare and give effect to majority opinion. Because the sovereign power is ultimately with the people, they assume that it should be immediate, direct and unrestrained. They brook no interference with the popular impulse. They lose sight of the fact that one of the chief objects of the law is to place a check upon power, and make the emotions subject to reason. The body politic as well as the individual has need of the discipline of a rational will. As Caesar said, laws are made to protect man, not only against others, but against his own emotions.

It is true as Mr. Justice Holmes said: "The first requirement of a sound body of law is that

it should correspond with the actual feelings and demands of the community, whether right or wrong." But we should not overlook the significance of the word *actual*. The feelings and demands with which the law must correspond are the real as opposed to the evanescent feelings and demands. They must be positive, genuine, certain, permanent. The law could not maintain its essential quality of stability, it could not serve as a fixed rule of conduct, if it were subject to change with every fluctuation of popular sentiment and emotion.

On the other hand the law must maintain its principle of growth. The very fact that it must correspond with the actual feelings and demands of the community makes necessary a course of development. The evolution of the law must coincide with the evolution of the human race. Any general advance of the human army must be an advance of all its departments. But the true officers of the law are not camp-followers; they are necessarily scouts and advance-guards. While the advance of one division must support the advance of another, the law does not follow like the commissary, but must lead like the engineers. As has been pointed out by Dean Pound, one of the functions of the law is that of social or legal "engineering." It was not by accident or mistake that the great leaders of Biblical times were referred to as Judges. The masses have always followed in the wake of the great lawgivers. It is disastrous to invert the order or reverse the process.

The great improvements in human relationships, the advances in legal evolution, follow, not the enactments of popular assemblies, but the legal pronouncements of such men as Hammurabi, Moses, Solon, the Roman jurisconsults, and Bracton, Coke and Marshall. The controlling force of such documents as Magna Carta, the great codes, and the Constitution may be conceded. But we should not forget the years of judicial decisions and legal opinions that preceded them, prepared the way for them, and then upheld them by constructive interpretation. How could the Constitution have been created without the preceding legal pronouncements upon the colonial charters? How could it have been maintained without the judicial sanctions of Chief Justice Marshall? If Washington was the father and Lincoln the savior of our country, surely Marshall was its preceptor. He charted the course of our national life. In our own time we have seen the minority opinions of Justice Holmes become majority opinions and mold our national thought, because they express a clearer perception of the fundamental law of our nature.

The guiding force in social evolution is not to be found in the arbitrary will of groups, nor in a common purpose. It is to be found in the law of our nature, that immanent or inherent law founded on the characteristics of human kind. "A law instilled and not imposed," as Cicero said, "a law in which we are fashioned, not instructed." It is not created by proclamation or legislative fiat. It is discovered by patient research and spiritual insight.

The true judge must have something of the vision of a prophet. He must be able to see the trends of his time extended, so that principles which he announces may be adjusted to conditions yet to come. The observation of Graham Wallas that a great judge needs a touch of the qualities that make a poet has been quoted with approval by Professor Chafee, Justice Cardozo, and others. Poets, as has been stated, bear the same relation to society as the antennae of an insect to its body; they are "feelers" of the body politic. Their sensibilities are more acute, more advanced than those of their contemporaries, and what they feel and express today their fellows will feel and understand tomorrow. Poets, prophets, judges—they are God's elect; we cannot elect them.

The great judge cannot be a child of his age. If his judgments are to be great they must be timeless, or at least timed to the future. The spirit of the law should enable him to transcend the spirit of his times and he should be able to speak *sub specie aeternitatis*. What a desecration of the office to choose its incumbent by any system which forces him to temporize!

Judges in early times were priests, or more accurately stated, the priests performed the functions of judges. There is still much about the judicial office that is priestly. This has ever seemed quite natural to those who took seriously their first legal learning from Blackstone, who stated at the outset that all human laws depend upon divine law. While for a time that teaching seemed out of fashion, the more recent trend is to acknowledge again our subjection to a law of nature, a law divine. Be that as it may, it will not be disputed that a proper performance of judicial duties requires

a devotion quite similar to the consecration of the priest. Judges, like the clergy, should be kept unspotted from the world. Any personal interest, selfish concern, or party consciousness, corrupts not only the judge but the judicial function. Any want of honest detachment in the judge undermines public faith in judicial administration. As has frequently been stated, it is quite as important to the public that judges should be free from the appearance of evil as that they should be free from actual evil. The prevalent disrespect for law is prompted not so much by corruption in the courts, as by that system of choosing judges which makes every judge suspect.

The taking of judicial office should be much like the taking of holy orders—one should not do so who is unwilling to suffer a kind of civil death. The only way in which one can be worthy of the office is by submerging self in the performance of the duties of the office. A judge should be only the voice of the law. As Cicero said, "While the law is a voiceless magistrate, the magistrate is law made vocal." It is arrogant presumption for a judge to pose as anything more, and gross indiscretion for him to assert his own voice. The only way in which he can avoid violation of the injunction, "Judge not, that ye be not judged," is by pronouncing, not his personal will, but the judgment of the law. How otherwise could a judge impose a death sentence and live in peace? If the judgment is his own, the blood of the condemned is upon him. If his judgment is at the behest of popular clamor he has given sanction to lynching. But if his judgment is the pronouncement of the law, the judicial function is fulfilled and his conscience is clear. The judicial robe should submerge personality and make its bearer, like a priest in vestment, an impersonal part of a divine function.

Lest this presentation seem too impractical, too idealistic, let us consider the matter in a manner more practical, more realistic. Senator Glass said in his speech accepting the medal of the National Institute of Social Sciences:

"It is a self-evident proposition that the public man who permits himself to pause long enough to inquire whether a thing is popular or unpopular, instead of seeking to know whether it is right or wrong, is not only useless but dangerous to his country. He is a coward to begin with and a menace always."

If such a statement can be asserted so emphatically about the public man generally, with what particular force does it apply to the judicial officer! It is his especial function to determine what is right and what is wrong, not only for the clamorous present but for silent generations yet to come. Chancellor Kent has acknowledged the force of the sense of right and wrong in arriving at judicial decisions. We know the importance of that sense in the mental processes of Justice Holmes. And Mr. Justice Cardozo, in *The Growth of Law* and *The Methods of Judging*, while acknowledging that most cases are determined by precedent, states that:

"Other cases present a genuine opportunity for choice—not a choice between two decisions, one of which may be said to be almost certainly right and the other almost certainly wrong, but a choice so nicely balanced that when once it is announced, a new right and a new wrong will emerge in the announcement."

And then he remarks that, "those are the fields where the judicial function gains its largest opportunity and power." Certainly there is less occasion, and less excuse, for the consideration of expediency in connection with judicial duties than with the duties of other offices. But the whole force of the elective system and of party influence is against that independence of character essential to fine judicial service.

The insidious and corrupting influence of that system upon the judicial function was succinctly and clearly stated in a report to the American Bar Association by a committee of which John Barker Waite was chairman:

"A judge's realization that his continuation in office depends on the personal good-will of particular lawyers, upon the favor of political leaders, upon widespread publication of his name before the people, and upon the help of the press, must inevitably influence his judicial conduct. Hence judicial action which should be guided solely by consideration of public interest may be unwittingly colored by self-interest."

A leading newspaper, commenting editorially on the report, added:

"To say it more pointedly, a judge elected by popular vote is likely to cater to public favor. . . Being elected through politics, he must play politics to be elected. . . Politics touches the judicial office only to cripple and enslave it."

Party influence always corrupts the work of the court. Partisan appointees are prone to be partisan judges. They lack the detachment of the scientist and philosopher and tend to be champions. Then ensues pride of opinion and asperity toward opposing views. That the court

is greater than its members is ignored, and "Truth is lost in the midst of disputes."

There are, of course, glorious exceptions. Some heroic characters have set themselves resolutely against such sinister effects; but then the danger is that the judge, in his strenuous effort to walk upright, may lean back. The elected judge is vote-conscious and the partisan judge is self-conscious—the system keeps him so. The influence may be withstood, but it cannot be excluded. It is always at court and it is destructive of that equanimity which is necessary for the proper performance of judicial duties.

Men maintain the system because they think it gives them an influence for the protection of their own special interests. In that they err. It merely tends to destroy the impartiality of the tribunal established for the maintenance of justice. In the maintenance of justice is their only hope for security. Justice is the only true solvent of social differences. It is the only level upon which a balance of peace can be established.

As long as man contends against man, capital against labor, locality against locality, party against party, courts must be maintained to preserve peace. These conflicting individuals and interests may barter for property, struggle for influence, strive for supremacy, in the world at large; but when they enter court they should stand on equal footing. No person, no interest, should have a favored position or sinister influence. Rights and responsibilities should be considered in the clear light of the law, and no shadow of the consciousness of influence possessed or votes controlled should dim the vision of the judge or excite the suspicion of the parties. Doubts should be resolved by consideration of the welfare of the state—the ultimate object of the law. This object can be realized only if the minds of judges are detached from worldly interests, freed from personal concern, and inspired by a zeal for truth and justice.

If the judicial function is to be preserved from corroding influences within, it must be intrusted to judges who have a tenure for life and good behavior. If the essential function of courts, the administration of the law, is to be performed efficiently, it must be performed by judges who are competent. A popularity contest is no more adequate to determine the competency of a judge than the competency of a surgeon, a teacher or a mechanic. If the best judges are to exercise the judicial function, they must be obtained by a process of selection —not election. And the best agency to make the selection is the legal profession. Its members are in a position to know and their own interests require the best.

Many voters yesterday, choosing among candidates whose names were often unknown to them, must have asked themselves if there is not some better method of selecting judges than the method which now prevails. Under the present elective system judicial candidates are in effect chosen by the leaders of the respective political parties, and their election is overshadowed by other issues and other candidates. The potential evils in such a system are well recognized. . . . . .

The problem of improving the method of the selection of judges should receive the interested and active support of every citizen. Lawyers alone cannot achieve the objective. We urge all voters while the matter is fresh in their minds as a result of the election this year to do what they can to achieve this desirable reform.—*New York Times*, November 7, 1945.

It is hard for the public to understand why judges claim to be accurate in decisions on the bench when there are so many reversals of decisions from the higher up judges, and so many conflicting decisions by the different judges, and so many conflicting decisions by the same judge on similar cases.—*Jesse Olney, formerly Judge Superior Court, Calif.*

Qualifications and Compensation of Minor Court Judges

EDSON R. SUNDERLAND

"If our sense of judicial propriety would be shocked by requiring the judges of the circuit court to collect their own compensation in the form of fees for judicial services rendered, we ought to be equally shocked when the same system is applied to our minor courts."

THE MOST SERIOUS and widespread complaint against the justice of the peace courts is that the justice is ordinarily not a lawyer.

Procedure in justices' courts, while relatively simple, has many technical features which cannot be eliminated, with the result that the parties are often seriously prejudiced by the justice's ignorance of the rules which should be followed.

Rules of evidence are as important in a minor court as in a superior court, and they cannot be understood or properly administered by anyone without legal training.

The questions of substantive law which arise in small cases are no less difficult than those arising in large cases, and if the rights of small litigants are to be protected according to law, the judges of the minor courts must know what the law is.

There are two primary reasons why the offices of justice of the peace have not usually been filled by lawyers.

One is that the justices are so numerous and are scattered so widely and uniformly over the territory of the state without any regard to population, that in most of the areas where justices must be elected there are no lawyers.

The other is that the compensation attached to the position is usually so small that a trained lawyer cannot afford to take the office.

Both of these obstacles to an adequate judicial personnel would largely disappear if a county court system were substituted for township justices.

Any county which produced enough judicial business to justify a county court would have lawyers enough to supply the necessary judges. If it did not produce that much business, it might be permitted to join with an adjacent county in maintaining a suitable court. Otherwise, it might be forced to continue the use of lay justices, but in such case the judicial business would be so small that a minimum of harm would result.

The small compensation of justices of the peace is the result of two contributing factors. One is the theory, upon which minor courts have usually been operated, that these courts should be as nearly as possible self-sustaining and should impose no substantial burden upon the taxpayers.[1] Consequently the financial resources available for the support of these courts cannot very greatly exceed the amount of fees, costs and fines which can be collected from litigants. These items, furthermore, are rather strictly limited by the principle that the cost of justice to litigants should not go beyond what the social and economic importance of the litigation will clearly justify. The other factor is the necessity of distributing these very restricted sums among the vast number of justices required under the township system of justice courts.

There are only two ways of increasing the compensation of the judges of minor courts, namely, to increase the total amount of funds available for the purpose, or to diminish the number of judges among whom they are distributed.

The resources available for the support of

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1. The sharp contrast between superior and minor courts in respect to the amount the public is willing to contribute toward the expense of operation, is shown by figures obtained by the Institute of Law of Johns Hopkins University regarding the courts in New York City, where litigants in the Supreme Court (corresponding to the circuit court in Michigan) were required to pay only 14.5 per cent of the cost of operation, while litigants in the municipal court paid 71.7 per cent. See "Costs, Fees and Expenses in Litigation," by Kenneth Dayton, 167 *Annals* of the American Academy of Political and Social Science 32, 40 (1933).

these courts could be increased either by raising the scale of fees, costs and fines, or by appropriations out of funds raised by taxation. The former method would doubtless be strongly opposed on the ground that it would increase the cost of justice to the poor litigant who is unable to afford it. The latter method is more in harmony with the modern trend in government toward extending the services which are furnished at the expense of the community.

REDUCE THE NUMBER OF JUDGES

It is probable, however, that a county court system could be largely supported, without recourse to either method of raising more money, by the mere expedient of reducing the number of judges employed. By concentrating all the minor judicial business of the county in a single court, the aggregate sum of costs, fees and fines resulting from its operation would usually be sufficient, and often much more than sufficient, to fully maintain it in accordance with the highest standards of efficiency, including compensation for judges large enough to attract competent and well trained lawyers.

If, in any case, however, the money collected by the court should not prove sufficient to provide adequate judicial salaries, it would probably require only a comparatively small appropriation out of public funds to supply the margin needed.

The experience of municipal courts and city justices now operating in Michigan shows that it is not at all impossible for court fees and fines derived from litigation arising within the limits of a city, to produce enough income to more than cover court expenses, including the salary of the judge.

If the jurisdiction of such a court were to be extended over the entire county, its income would be increased in exact proportion to the additional business brought in, while the cost of operation would increase at a much smaller rate, or possibly, in case the court were operating with a margin of unused capacity, it might not increase at all.

The experience of city courts in Michigan indicates that a population of 10,000 may be large enough to justify the maintenance of a minor court with the minimum full time staff of one judge and one clerk. Such a staff would ordinarily be adequate to serve a population up to 20,000 or perhaps more, particularly if the territory were largely rural. Larger populations, without any maximum limit, could be served at a diminishing rate of expense, by enlarging the personnel of the court.

PART-TIME JUDGES IN SMALL COUNTIES

The smaller counties might not, in many cases, produce enough judicial business to warrant the maintenance of a minor court with a full-time legally trained judge. But it would not necessarily follow that the township justice system ought to be retained in those counties. It might still be possible to obtain the part-time judicial services of a competent lawyer with the funds available for the support of the court.

Part-time judges have frequently been objected to on the ground that their interest in other business diverts their attention from their judicial duties. This would be true to some extent in any case. But such interference would probably be reduced to a minimum where the part-time judge is a lawyer, for all his work as an attorney would merely enlarge his knowledge of the law and develop his ability to deal with legal problems, thereby increasing his effectiveness on the bench.

Part-time judges are less accessible and their courts less convenient, because of their limited office hours. A full time clerk, however, who could be maintained at a comparatively small cost, would substantially diminish these drawbacks. Furthermore, in case the part-time judge were a lawyer he could usually be found at his own law office, while not holding court.

A special objection to lawyers as part-time judges has arisen in cases where the lawyer practices before other justices of his own court, or in other courts exercising a jurisdiction similar to or concurrent with his own, or where he is associated in practice with other lawyers, who bring their cases before him or before other judges exercising a concurrent or similar jurisdiction.

It is entirely possible, however, to protect a system using part-time judges against these undesirable practices.

Thus, in California, no justice of the peace is permitted to practice law before another justice of the peace in the city, town or county where he resides, or to have a partner engaged in the practice of law in any such city, town or county.[2]

In Indiana it is unlawful for any justice to

2. Cal. Code of Civ. Proc. Sec. 103(g), as amended by Ch. 476, St. Amend. 1941.

practice in any other justice court in the county where he lives, or to act as attorney in any case appealed from said courts.[3] In Mississippi, the same prohibition is extended to the justice's partner.[4] Similar provisions are found in Nebraska,[5] South Carolina,[6] Vermont[7] and Wisconsin.[8] In Massachusetts no part-time judge may hear or try a motor tort case if he is directly or indirectly retained, employed or practices as an attorney in motor tort cases.[9]

Other things being equal, a full-time judge is undoubtedly preferable to a part-time judge. But since a full-time judge of any kind is out of the question in sparsely settled counties, the choice open to those counties is really the choice between part-time judicial services rendered by a competent lawyer and part-time services rendered by the lay township justices. As between those alternatives the advantage would seem to lie with the legally trained county judge.

Most of the "trial justices" in the new Virginia county court system render only part-time judicial services. In 1940 the then president of the Trial Justices Association, stated to the present writer that only about half a dozen trial justices in the state gave full time to their judicial work. On the average they devoted about one-third of their time to the duties of their office. And yet they were sufficiently well paid so that 67 out of 90 of them were attorneys at law with very satisfactory qualifications. The public appeared to have no general complaint against the part-time system of judicial service, and the opinion prevailed that better men were obtainable on a part-time basis than could be had if they were required to give up their practice for a full-time job carrying any salary that could be paid. The salaries of the trial justices ranged from $600 to $3600. The latter amount was a half-time salary paid to the trial justice in Richmond. The average salary was $1550,[10] which represents the compensation for services averaging one-third of the incumbent's time.

Maryland also has a new trial justice system, somewhat similar to that in Virginia, though there are fewer and larger counties and each is served by from one to fourteen salaried trial justices. Most of them are lawyers serving on a part-time basis, and the present writer was assured by the attorney general's department in 1940 that the office attracted a very desirable type of incumbent, and that the results were satisfactory.

THE FEE SYSTEM

It will not be sufficient, however, as a measure of reform, to so organize our minor courts that the judges will receive adequate compensation. There is a further requirement, namely, that the amount of the compensation must not be permitted to depend on the efforts of the judge in attracting business to his court. This means that the fees paid by litigants shall not go directly to the judge.

The fee system for directly compensating judges is of ancient origin. Even the king's judges in the great courts of the common law were paid by fees collected from the litigants. "A great deal of our legal history," says Maitland, "is to be explained by the fact that for centuries the judges were paid by fees; more business therefore meant more money, and they had a keen interest in attracting cases to their courts."[11]

The courts of King's Bench, Common Pleas and Exchequer countenanced the use of fictitious allegations of trespass and of indebtedness to the king, for the sole purpose of stealing business from each other, thereby increasing the fees of the judges.[12]

But the fee system for compensating the judges of the superior courts long since disappeared, and at the present time no one would seriously propose its revival. And yet the principle involved is exactly the same whether the system is used in the lower or the higher courts. If our sense of judicial propriety would be shocked by requiring the judges of the circuit court to collect their own compensation in the form of fees for judicial services rendered, we ought to be equally shocked when the same system is applied to our minor courts.

The primary evil resulting from the fee system is the pressure it exerts on each justice who

3. Ind., Burns Stat., 193, Sec. 10. 3105.
4. Miss. Code Ann. 1942, Sec. 3698.
5. Neb. Comp. Stat. 1929, Sec. 7-111.
6. S. C. Code 1942, Sec. 3722.
7. Vermont Pub. L. 1933, Sec. 1444.
8. Wis. Stat. 1943, Sec. 300.03.
9. Rule promulgated by Administrative Committee of the District Courts, effective Jan. 1, 1943. 13 Boston Bar Bulletin (June, 1942) No. 6.
10. From statistical data prepared in 1940 by W. F. Binford, secretary of the Trial Justices' Association.
11. Maitland, *Const. Hist. of England*, 135.
12. *Id.*

operates under it to get more business in order to enlarge his income.

This struggle to increase his business may take the form of encouraging litigation in his court of controversies which otherwise might never get into courts at all.

The opportunities for building up this kind of business are rather limited in the civil field, though working arrangements between justices and collection agencies whereby a procedure is established for routing all collection items through the justice's court are not entirely unknown.

In the criminal field, and particularly in the enforcement of municipal ordinances, there are much greater possibilities. The so-called "speed-traps" which occasionally annoy motorists on our highways are often the result of arrangements between a local justice and constable to carry on an intensive and technical campaign to enforce the traffic laws or ordinances, for the primary purpose of collecting fees. Frequently arrests are based on false charges regarding the facts or illegal claims regarding the law, but the justice and his executive assistant, the constable, rely with a large measure of success upon the willingness of the victims to pay the exactions of the justice rather than wait a day or two in a strange town for the privilege of being found guilty after a so-called trial.

This temptation for the judges to encourage litigation on account of the profit which it produces is inherent in every tribunal whose judges are paid directly by fees, whether such tribunal exercises an exclusive jurisdiction free from competition or operates as one among a number of competing courts. Therefore, the weakness here noted cannot be cured by reducing the number of justices operating within the same area, or even by substituting a single court to which all cases would necessarily go.

COMPETITION AMONG COURTS

There is another method, still more effective and far-reaching, whereby a justice of the peace may increase his business and his resulting income, and that is by taking business away from other justices, as the judges of the king's court did in the ancient days of the common law. To do this it is necessary to offer inducements, and the best inducement in the field of civil litigation is a fair degree of assurance that the party who brings the case to the justice will obtain the judgment that he seeks. Since it is the plaintiff who selects the tribunal, the business is likely to go to a justice who shows proper solicitude for the welfare of plaintiffs. The system therefore offers a monetary reward for rendering judgment for the plaintiff. This is the basis for the popular witticism that "J. P." signifies not only "Justice of the Peace" but also "Judgment for the Plaintiff."

Striking instances of these undesirable results of competition for fees are not infrequently found in tacit arrangements between certain justices and large dispensers of judicial business, such as collection agencies, department stores, finance companies, and even law firms having large collection departments, whereby all the suits which they find it necessary to commence will be brought before such justices so long as the service which they render continues to be satisfactory.

How much truth there is in the widespread suspicion that the justice favors the plaintiff is shown by figures obtained in a survey of the civil judgments rendered by the justices of the peace in six counties of Michigan, outside of incorporated cities, during a period of about two years.

All the civil business in the six counties was done by 16 township justices. During the period studied these justices rendered 933 judgments, of which 926 were for the plaintiff and 7 were for the defendant. That is to say, the plaintiff won in 99.2 per cent of the cases while the defendant won in 0.8 per cent of the cases.

This compares with figures showing the number of judgments for plaintiffs and for defendants rendered in some of the superior courts of this state, namely the Circuit Courts of Kent County, and the Superior Court of Grand Rapids, during the years 1929 to 1931, and the Circuit Court of Lapeer County from 1923 to 1931. Out of 266 judgments rendered, 173 were for the plaintiff and 93 were for the defendant. That is to say, the plaintiff won in 65 per cent of the cases and the defendant won in 35 per cent of the cases.

Doubtless the percentage of plaintiffs who deserve to win is always larger than that of defendants, because one would not ordinarily start a suit unless he was strongly convinced

13. Fourth Annual Report, Jud. Council of Mich. 170 (1943).

14. Second Annual Report, Jud. Council of Mich., 71, 72 (1932).

that he had a meritorious claim. But the discrepancy between the results in our higher trial courts and those before township justices of the peace is so great as to raise serious doubts as to whether the fee-supported justice is an impartial tribunal.

COOPERATION IN CRIMINAL CASES

The situation is similar in the administration of the criminal law by justices of the peace who are compensated by fees. Most criminal complaints are made by officers exercising police powers. These officers naturally seek convictions, and would be expected to patronize justices who aid them in their efforts rather than those who insist too rigidly upon protecting the rights of the defendants. A sympathetic attitude toward the views of the police is therefore quite likely to result in more business and an increase in the justice's income.

It is very common in all states where justices of the peace compete for business, to find instances where the sheriff's office, or the state police, or any other agency engaged in enforcing the criminal law, take most or all of their cases to certain justices notwithstanding the fact that other justices may be more conveniently accessible. In such cases it is difficult not to conclude that the favored justice renders service acceptable to the officers who bring in the business. As Warren observes, regarding the distribution of traffic cases, "few cases will be brought to the justice's court if his dispositions do not satisfy the arresting force."

Statistics obtained by Warren through questionnaires from 63 counties in Michigan, regarding the percentage of convictions in traffic cases, showed that out of 35,800 cases reported for the period 1931-1936, there were only 914 dismissals. This represents 97.5 per cent of convictions. These figures would seem to suggest that most traffic cases were handled by justices who were quite sympathetic with the enforcing officers.

It is not, of course, the fee system alone which produces this kind of bidding for business, but the fee system coupled with a multiplicity of judges exercising the same jurisdiction in the same area all competing with each other. If such competition were eliminated by abolishing these numerous justices operating throughout the several counties and substituting for all of them a single county court having exclusive jurisdiction of all minor cases, the judgments rendered would undoubtedly be more fair and impartial.

ATTRACTING QUALIFIED MEN

While the most glaring evils growing out of the fee system of compensating judges are the incentives it offers to the judge to promote litigation and to reward the parties who bring in the business, the system has the further serious defect that it provides an income too variable and uncertain to be attractive to men of superior ability.

To avoid the various evils growing out of the fee system for compensating judges, there is a well-marked tendency at the present time to require the costs and fees collected by the minor courts, as well as the fines levied for violation of penal laws and ordinances, to be paid into the general funds of cities, counties or the state, and to compensate the judges by fixed salaries drawn against such funds. By this means the court costs and fees are used in whole or in part as reimbursement for the salaries paid to the judges. This system has one weakness. Judges often feel that they can fortify their own position by demonstrating to the taxpayers that the court can be operated at a profit to the public, or at least without much loss. The larger the income the judge can show the more favorable his financial report will appear. In such courts, however, almost the only way in which the judge can increase the income of the court is to impose more or larger fines, their number and amounts being to a considerable extent matters within his discretion. There is thus inherent in the system a ground for the suspicion that fines are levied with some thought for making a good financial showing for the court.

No judge ought to feel the slightest responsibility for the financial status of his court. He should be given no credit for its success in paying its own way, and should be subject to no criticism for its failure to do so. A court is not a commercial institution, and there is no more reason why minor courts should be self-supporting than that superior courts or public schools should collect fees sufficient to cover their expenses. As in the case of all public services, it is a question of legislative policy

15. Warren, *Traffic Courts*, 218 (1942).

16. *Ibid.*, p. 219.

how far the costs should be borne by those immediately benefited by the service and how far they should be carried by the general taxpayers. The success of a court as an agency for the administration of justice cannot be determined and should not be judged by financial results.

As for the professional qualifications of the county judge, whether serving full time or part time, they might well be the same as those for judges of municipal courts which are now prescribed in Michigan. Thus, justices in cities of not less than 100,000 population must be "attorneys at law of four years standing";[17] under the Home Rule Act, in any city, which, by charter, shall abolish justices' courts and consolidate their powers into a single court, the judge of such court must be "an attorney at law admitted to practice law in the supreme court of this state,"[18] and such charters frequently provide that the judge of the city court shall be an attorney admitted to practice before the courts of this state for a minimum period of five years.[19]

One of the advantages which would undoubtedly result from the substitution of lawyers for laymen as judges of inferior courts, would be a reduction in the risk and the burden of appeals. Litigants would be more ready to accept judgments rendered by judges trained in the law. This is a matter of substantial importance in view of the large number of minor court appeals now being tried by the circuit courts of this state. In 1942 no less than 14 per cent of all the civil cases at law actually tried in the circuit courts were appeals from justices of the peace.[20]

17. Mich. Comp. L., 1929, Sec. 16,429; Mich. Stats. Ann., Sec. 27. 3751.
18. Mich. Comp. L., 1929, Sec. 2264; Mich, Stats. Ann., Sec. 5. 2107.
19. The charters of Pontiac, Jackson, Flint and Highland Park, which are typical, specify a period of five years.
20. Thirteenth Ann. Rep. Jud. Council of Mich., 35 (1943).

The Bankruptcy Administration Reform Bill

CHAUNCEY W. REED

On Wednesday, October 24, 1945, the House of Representatives passed H. R. 4160, described as a bill to reform and modernize the Bankruptcy Code. As part of the discussion preceding the passage of the bill, Representative Reed of Illinois, its author, gave the following informative summary of its background, history and provisions. For a full account of the discussion see 91 *Congressional Record* 10162-78.

MR. CHAIRMAN, bankruptcy has been termed a "gloomy and depressing subject" and has often been characterized as a necessary evil in any modern system of jurisprudence. Goethe once said:

"Let us live in as small a circle as we will, we are either debtors or creditors before we have had time to look around."

Whenever the relationship of debtor and creditor exists, some may always be found who either cannot or will not meet their obligations. Such persons are either unfortunate or dishonest. The laws of ancient days deemed insolvent debtors as criminals and the Romans permitted creditors to inflict upon them both physical torture and death. Probably the first bankruptcy statute known to man was enacted during the time that Julius Caesar guided the destinies of ancient Rome. It was a one-sided statute and permitted debtors to escape punishment by surrendering to their creditors all of the property of which they were possessed. It did not discharge the debts but merely avoided the penalties.

In England debt was also considered a crime and subjected the offender to imprisonment. It was to escape such severity of English laws that shiploads of its citizens were willing to go forth from the mother country and start life anew amid the hazards and dangers of the pioneer settlements along the eastern seaboard of North America. The first bankruptcy statute enacted in England came into being in 1542 during the reign of Henry VIII. Like the Roman law enacted about 1,600 years previous, it too, was a one-sided piece of legislation. Un-

like the law of Caesar which permitted only the debtor to invoke its protection, the British statute was enacted for the benefit of creditors and merely provided for an equal distribution of the debtor's property without releasing him from his debts. It was not until 1705 during the reign of Queen Anne that England placed on its statute books a bankruptcy law that served the twofold purpose of discharging a debtor from his obligations upon the surrender by him of his property for the benefit of his creditors.

BANKRUPTCY IN AMERICAN HISTORY

Very little is found in the debates of the Constitutional Convention of 1787 relative to this subject. The clause subsequently embodied in article III, section 8, of the United States Constitution granting to Congress the power "to establish uniform laws on the subject of bankruptcies" was proposed by Mr. Charles Pinckney, of South Carolina, and referred to a committee of which Mr. John Rutledge, also of South Carolina, later Chief Justice of the United States, was chairman. Upon a favorable report it was agreed to with scant debate. Mr. Roger Sherman, of Connecticut, observed that "bankruptcies were in some cases punishable with death by the laws of England" and stated "that he did not choose to grant a power by which that might be done here." Mr. Gouverneur Morris, of Pennsylvania, said that "this was an extensive and delicate subject" but that "he would agree to it because he saw no danger of abuse of the power by the Legislature of the United States." Connecticut, Mr. Sherman's State, cast the only negative vote on the adoption of this clause. James Madison in the *Federalist*—No. 41—said:

> "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie, or be removed into different States that the expediency of it seems not likely to be drawn into question."

He doubtless had in mind the fact that at that time only two states, Pennsylvania and Rhode Island, had bankrupcy laws in force and without a federal enactment, it would be a simple matter to defraud one's creditors by removing assets into states where local laws were nonexistent.

Irrespective of the adoption of the Constitution and power granted therein "to establish uniform laws on the subject of bankruptcies," no such power was exercised by Congress until 1800, eleven years after the organization of the Government and then only after three successive panics or business depressions which involved millions of dollars and caused such prominent men as Robert Morris to be imprisoned for debt for three years and Justice James Wilson of the United States Supreme Court to remove to North Carolina in order to escape imprisonment for debt in his own state of Pennsylvania.

The act passed by Congress in 1800 was repealed in 1803. It provided only for involuntary bankruptcies and was limited to traders. In 1841 a new law providing for voluntary, as well as involuntary proceedings and applying to traders, bankers, factors, brokers, underwriters, and marine insurers was enacted but this, too, was repealed two years later. In 1867 Congress passed its third bankruptcy statute which remained on the statute books until 1878 when it, too, was repealed. Nothing was then accomplished until 1898 when a comprehensive bankruptcy statute was enacted, which though several times amended remained continuously in force until superseded by the Chandler Act of 1938. Sponsored by our distinguished former colleague Hon. Walter Chandler, of Tennessee, this law has been acclaimed by lawyers, jurists, and businessmen generally as one of the most worth-while accomplishments of the American Congress in the past decade. It was the result of many years of intensive study by the Committee on the Judiciary of this House, ably assisted by the counsel and advice of representative groups of businessmen, labor organizations, and leaders of the bench and bar.

BANKRUPTCY ADMINISTRATION STUDIED

The year following the enactment of this legislation, Attorney General Frank Murphy appointed a committee of which Solicitor General Robert H. Jackson was chairman, to make a thorough study of the administration of the Bankruptcy Act. Upon the elevation of Mr. Murphy to the Supreme Court and the appointment of Mr. Jackson as Attorney General, Dean Francis M. Shea, of the University of Buffalo Law School, was made chairman. The committee made a thorough and intensive investigation and on December 16, 1940, made a com-

prehensive report of its findings and recommendations. Briefly it urged a strict supervision of the fiscal responsibilities of referees and advised that the appointment, tenure of office, and compensation of these officials be modified. A bill to attain these results was introduced in the Seventy-seventh Congress by another of our distinguished former colleagues, Honorable Charles F. McLaughlin, of Nebraska. After hearings by the Special Subcommittee on Bankruptcy and Reorganization, it was amended, reintroduced, passed upon favorably by the Committee on the Judiciary and reported to the House. Identical bills were introduced in the Seventy-eighth and Seventy-ninth Congresses by the gentleman from Alabama (Mr. Hobbs).

In the meantime the Conference of Senior Circuit Judges gave this matter considerable study and offered many suggestions which seemed pertinent and practical. A new bill was introduced and after hearings and amendments was reintroduced and favorably reported to the House. It is that bill which we now have before us for consideration. It carries not only the approval of your Committee on the Judiciary but also that of the Attorney General; the Conference of Senior Circuit Judges; the Securities and Exchange Commission; the Civil Service Commission; the National Retail Credit Association; the Commercial Law League of America; the bankruptcy committee of the Section on Corporations, Banking and Mercantile Law of the American Bar Association; the National Association of Credit Men; the Bar Association of the City of New York; the Minneapolis Association of Credit Men; the Colorado Bar Association; the Denver Bar Association; the Chicago Bar Association; the Bar Association of St. Louis, and many others.

SUMMARY OF PROPOSED CHANGES

The Chandler Act like the one which preceded it, authorizes the appointment of referees in bankruptcy by the several district courts. These officials hold office for terms of two years, are eligible for reappointment and are likewise subject to removal upon the discretion of the district judge. Their compensation consists of fees derived from the bankrupt estates referred to them for adjudication. Their functions are complex, being both judicial and administrative. They act as an arm of the court, passing on the claims of creditors, schedules of properties of bankrupts, wage-earner plans, priorities, dividends, and a vast number of other duties. They grant, deny, and revoke discharges, swear witnesses, consider testimony, approve bonds and in fact, act as assistant judges in matters relating to bankruptcies. It is essential, therefore, that persons selected as referees should be of the highest character and have the legal training and judicial capacity to render intelligent and impartial service to the creditors, the bankrupt and the court. Uncertainty of tenure is a deterrent to attaining this objective. The bill now before us retains the right of appointment in the district judges but increases the term of office from two to six years. It likewise provides that any referee thus appointed shall, upon the expiration of his term, be reappointed unless found to be incompetent, neglectful of his duty or guilty of misconduct. It offers no protection to bad referees but insures good ones against summary dismissal for personal or political reasons.

This bill contemplates a drastic reduction in the number of referees and the creation and maintenance of a system whereby such officials shall devote their entire time to the duties of their offices, shall not be permitted to practice law or engage in other business and shall be paid salaries rather than depend upon commissions for their compensation. The director of the Administrative Office of the United States Courts is required, within one year, and from time to time thereafter, to make a careful study of the general bankruptcy litigation in the country as a whole and in each judicial district thereof. From such survey he shall recommend to the district judges, the council of circuit judges for each circuit and the conference of senior circuit judges, the number of referees required, the territory they shall serve, the salary they should receive and the schedule of charges to be made in asset, arrangement, and wage-earner cases. He shall likewise recommend the appointment of part-time referees in territory where the business in bankruptcy courts is not sufficient to justify the appointment of a full-time official. Full-time referees shall be paid salaries of not less than $3,000 per annum nor more than $10,000. Part-time referees shall be paid not more than $2,500. The final determination of these recommenda-

tions is made by the conference of senior circuit judges who will have the benefit of advice from the councils of circuit judges, who in turn will have had the views and recommendations of the various district judges of their respective circuits.

The fees from which the referees' compensation is now derived will remain unchanged but instead of being retained by the referees, they shall be deposited in the United States treasury where a revolving fund is created out of which their salaries will be paid in monthly installments.

Likewise the moneys now collected from bankrupt estates for referees' expenses shall be collected as heretofore but shall also be turned over to the treasury into another revolving fund out of which referees shall receive their expenses. Inasmuch as referees' compensation and expenses are now borne wholly from the assets of bankrupt estates, it is not unreasonable to presume that the proposed system will be self-sustaining. Such is the opinion of the director of the Administrative Office of the United States Courts.

Lastly this bill contains a retirement clause and accords to referees and their employees the benefits granted to officers and employees in the judicial branch of the Government under the Civil Service Retirement Act of 1930. It places them in the same category as United States attorneys, clerks of the courts, United States marshals, and their employees.

THE FEE SYSTEM ABOLISHED

These are the principal features of the legislation now before us. It is the sincere opinion of the various groups and organizations that have studied this problem over a period of many years that the Chandler Act as amended by the provisions of this bill will be greatly strengthened and the administration of bankruptcy in the United States courts will attain a high level of efficiency. If such can be accomplished the debtor and creditor will alike be benefited. The inequities of the present system are all too patent. It is absurd to ascertain that in many cases referees receive remuneration far greater than that of the judges who appointed them and in other instances their fees do not compare with the wages of a salesgirl at a ribbon counter. Certainly the reduction of the number of referees and the certainty of definite salaries, determinate tenure of office, and retirement benefits will attract competent lawyers to a career service in the bankruptcy courts.

More important to me in the enactment of this bill is the fact that it means the abolition of the vicious fee system.

A law which provides that compensation of a judicial or semijudicial officer may be increased or diminished, dependent upon his decision in matters before him for adjudication, creates distrust and suspicion in the minds of litigants, no matter how honest or impartial he may be. Such a law in a free country is outmoded before its enactment.

In concluding these brief remarks I wish to pay a well-deserved tribute to our learned colleague the gentleman from Alabama, Judge Hobbs. As chairman of the Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary for the past three years, he has labored assiduously and incessantly to perfect a measure that would remedy a serious defect in our judicial system. The universal approval of this bill by the bench, the bar, and business organizations is a high tribute to his perseverance and skill. Although many have to a greater or less degree contributed to the task of constructing this legislation, if, by your will, it is ultimately enacted into law, his will in no small measure be the triumph.

Why strangle a judge and force him to sit silent when he recognizes a cunningly disguised falsehood foisted upon the jury, or sees an honest witness badgered into the appearance of falsehood? Why choke his restraining word when he hears a good reputation mendaciously assailed in his courtroom, or knows that prejudices are set on fire by subtle and clever appeals to religious, racial or other passions? Why not permit the sworn judge to raise his voice in defense of truth?—*George M. Hogan.*

Photographic Aids to Law Training and Bar Activities

CHARLES B. STEPHENS

ALTHOUGH THE PRACTICAL VALUE of visual aids has long been established in general education, they have never been utilized to the full extent of their possibilities in training for the profession of law. Dean Wigmore's colorful lantern slides on the world's legal systems, and the motion picture-sound recordings of lectures by Beale, Williston and Wigmore were isolated experiments that languished for lack of effort to apply their techniques more generally in legal education.

Technical advances in both still and motion photography now make it possible greatly to expand the usefulness of these mediums of reproduction in training programs. There are many ways in which legal education and vocational guidance in the profession of law may be improved by photographic aids, to the benefit of the public and the profession alike.

VISUAL AIDS IN TEACHING EVIDENCE

Many courses in the curriculum of formal legal education lend themselves readily to photographic exposition. Evidence, as usually taught, often becomes a confusion of rules and exceptions to be memorized for an examination. Why not work out a series of short motion pictures illustrating the practical difficulties that arise in translating what witnesses see and hear into their testimony in court some time after the event?

Start, for example, with a collision between two automobiles at a busy street intersection, and the gathering of the inevitable crowd of spectators. Select a group of typical witnesses, including the participants themselves, and illustrate the story of each with the photographic record of just what he was in a position to see and hear, before, during and after the collision. From such a demonstration should emerge with impressive clarity the reasons why stories of witnesses to the same sequence of events can and will honestly vary, and how the rules of evidence operate to narrow the testimony in court to that which will produce the most accurate and truthful story possible.

The same technique can be used to explain the significance, value and limitations of testimony of expert witnesses, illustrating the accepted methods of producing and interpreting such mechanical aids to testimony as X-ray or microscopic photographs. The field of medical science already possesses an extensive library of motion pictures dealing with the treatment of common diseases and injuries that would be of great interest to students of evidence.

By the same token, many of the excellent highway and industrial safety films could be used to advantage in illustrating situations likely to lead to compensation and personal injury claims. The *Crime Does Not Pay* series produced professionally a few years ago demonstrated many techniques of the science of criminal detection.

DAYLIGHT SCREENS IN THE CLASSROOM

The process by which lantern slides can be made directly from typewritten copy has many applications in fields of law that are less dramatic than evidence, torts and damages. Using daylight screens, whole sections of statutes, court opinions, or lecture outlines can be placed before a class for discussion and accurate copying. Projectors are available that reproduce printed text without slides, and the micro-filming process provides another convenient means of reproduction that can be most helpful to the law professor.

It is unfortunate that the necessity for concentrating on specific subjects, in order to cover them thoroughly, often leaves the student with a distorted view of how these seemingly unrelated fields fit together in the practice of law. A series of motion pictures, especially prepared for the purpose, might effectively illustrate the interrelation of the various branches of law in meeting typical problems that arise in practice.

Thus a story might open with conferences of parties litigant with their respective counsel, each telling counsel his version of the story.

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Then would follow the necessary investigation and contacting of witnesses, leading into discussion of the theories on which the case might be brought to issue. At this point the pleadings would be drawn, filed and served, with a possible pre-trial hearing in the matter.

The trial would be fully presented, covering the selection of a jury, opening statements by counsel, and introduction of evidence. After verdict and judgment, the case might be followed through on appeal, with preparation of abstracts and briefs, and the oral argument before the court. By such a series, the law student would see how the theory of the case influences the drafting of pleadings and examination of witnesses, and the effects of pleading and trial on the subsequent appeal, to form a complete picture in which many fields of law training fit together in their appropriate places.

Many types of law office practice can be demonstrated in like manner. Every step in the organization of a corporation, the preparation of tax returns or other governmental reports, the drafting of wills and trust deeds, the examination of abstracts of title to real property, the administration of decedent's estates, and other typical routines of general law practice can be presented photographically to illustrate the ways in which the lawyer applies his legal training to the solution of the problems of his clients.

A series of motion pictures of this character would do much to bridge the gap that now exists between formal law training and the practice of the lawyer. By showing the law student what the lawyer does and how he does it, the law school would give him a familiarity with practice that the average law graduate now lacks. It would take away much of the fear of the unknown about law practice that hampers many otherwise brilliant and capable young lawyers.

The application of these techniques would help rather than hinder the law professor. They would save his time in explaining fundamentals, they would permit him to concentrate on the more difficult problems, and they would stimulate the interest of the students in the subject at hand. With projectors in which the motion can be stopped at will, the instructor could pause at intervals to introduce his own commentaries and answer questions.

VOCATIONAL GUIDANCE

An equally interesting field for still and motion photography is that of vocational guidance in the legal profession. A brief, educational film on the practice of law, for high school and other students seeking vocational counsel, would be welcomed throughout the country. Such a film should present the facts relating to training and admission requirements and the work of courts and the lawyer frankly and fairly, from the point of view of intelligent information rather than that of attempting to enlist wholesale recruits for the profession without regard for their qualifications to follow it.

There is need, too, for a similar film to give law students more specific information on which they may base their decisions on how and where they may best apply their law training. The pamphlet *Look Before You Leap*, recently published by the American Bar Association, illustrates the type of material that could be adapted to this purpose. Thus could be shown the opportunities for law-trained personnel both within and without the actual practice of law, the conditions of practicing alone or in association with other lawyers, and the factors to be considered in choosing a location in which to practice.

Experience in counselling returning lawyer veterans and young lawyers seeking to establish themselves in the practice of law suggests a further use for photographic aids that might be as valuable as it would be interesting to experiment with. This is the matter of attempting to assemble either still or motion pictures portraying the conditions of living and law practice in specific communities throughout the various states.

The state of Illinois offers an example of what might be done. Approximately 400 miles in length, and 250 miles across its greatest width, the state is divided into 102 counties that represent practically a cross-section of the entire United States in their diversity of resources, background and sources of occupation. Within the limits of its climate and topography, Illinois can offer the young lawyer practically any type of community he desires, from metropolitan Chicago to rural villages, mining or oil production, heavy industry to light manufacturing, agriculture ranging from livestock and grain to cotton and fruit orchards—name what

you want and you will probably find it somewhere in Illinois.

With such a diversity, it is obviously impossible to speak in terms of typical conditions that would apply to the entire state. In counselling young lawyers on localities in which to practice, we must first discuss the general character of the different regions of the state, and from that we proceed to consideration of those areas that fit most closely the natural interests and desires of the individual in question.

How much simpler it would be if we could illustrate this discussion with photographs that would let them select visually the cities and areas that appeal most to them. With the choice narrowed down, we could then turn to files of photographs of the specific localities, to help explain what they might expect in the way of living conditions, court facilities and law offices.

Not many states face this same problem, yet there are enough to suggest that the idea is worthy of serious consideration as a definite service that state bar associations and law schools can render to the coming generations of lawyers. A suitable film covering the entire United States would be of interest to the students of every law school.

THE BAR ASSOCIATION PROGRAM

The value of these suggestions is not limited to students in training. Many films designed for law school presentation would fit perfectly the bar association programs of advanced legal education. This would be particularly true of film treatments of such subjects as use of law books, law office management, techniques of office and court practice, and all subjects of federal and general law.

It is not too difficult, either, to sense the possibilities of photographic aids to the public relations program of the organized bar. A few films on common legal problems, sponsored by bar organizations, could gain wide and ready circulation among civic clubs and other lay organizations. This medium could be particularly effective in the public education programs incident to activities of the bar related to the unauthorized practice of law.

Since the fear of cost is a bugbear that stifles much progress in legal education and organized bar activity, it is well to point out that many of the above suggestions could be carried into immediate effect without undue expense other than the time and effort required for research and planning. A canvass of the lists of educational, promotional and training films already available, most of them without cost or at purely nominal rental, would reveal a wealth of material that can be of great value in developing an initial program of this character.

Where plans call for the production of films, there are hundreds of lawyers throughout the country whose experience in still and motion photography, as a hobby, well qualifies them to produce pictures of professional quality. They form a nucleus within the profession whose interest and skill in photography combined with professional experience in the law would be of inestimable assistance in working out the details of planning and production. With their own cameras, they could produce short subjects of professional and artistic merit, at little more than the cost of materials involved.

For the more ambitious projects, the professional, commercial studios are available. Law schools and bar associations could well provide a fund for the making of these more finished products, designed for use throughout the country. Law publishers, insurance companies, banks, and trust companies are among the lay groups whose interest in the profession might prompt them to contribute to projects of this character.

The whole field of photographic aids in law training and organized bar activity is wide open and as yet but barely touched. It is a challenging field for the law school or bar association with leaders of creative imagination. Who will be the first to seize upon it?

The law dominates, or the sword rules. That is the choice, and examples are upon our doorstep. Weaken the law, temper its honesty of administration, and the tramp of marching feet grows louder. Strengthen it, make its application just and curative, and visions of marching hosts grow dim.—*Percival E. Jackson.*

The House of Delegates in the State Bar Association

THE TENTH ANNUAL MEETING of the State Bar of Michigan, held in Detroit October 31 and November 1, provided an interesting case study in the mechanics of state bar government. At luncheon on the opening day, Mr. Justice Bushnell of the Supreme Court of Michigan described his experiences and observations during a recent tour of Europe to an overflow crowd in the grand ballroom of the Book-Cadillac Hotel. At the conclusion of that meeting, long lines formed before the checkroom windows, although the annual business meeting was scheduled to start immediately in the Crystal Ballroom across the hall. When that meeting got under way something less than two hundred members were present, and their number dwindled from hour to hour as the afternoon wore away. Throughout the time the business meeting was in session, knots of two and three lawyers could be seen conversing in the corridors and lobby of the hotel. Up in the Crystal Ballroom those who had the fortitude to do so, or could think of nothing better to do, sat through the admittedly tedious reports of committees, most of which were summarized with a reference to the printed text in the State Bar Journal, and many of which required no action other than a motion that they be received and filed.

With the vote on the last committee report, an anticipatory buzz arose throughout the room, and the chairman announced that the next order of business would be the consideration of resolutions. Then it became apparent that not all of the attendance at the business meeting was haphazard. A list of resolutions prepared by a certain group of lawyers was offered for the consideration of the State Bar of Michigan. The resolutions dealt with a variety of topics, most of them along the lines that have characterized that organization's activities since it was founded. One after another they were presented, discussed and voted upon by the assembly. Some were adopted, some rejected, and some laid on the table. The significant fact is that members and adherents of that group were present in such numbers that they very nearly controlled the State Bar vote on every one of the resolutions presented. The vote, for example, on the motion to table the resolution proposing that the State Bar take a stand against the Michigan one-man grand jury was 62 for and 52 against. The negative vote on that motion was the approximate voting strength of that particular segment of the assembly. That action was publicized in newspapers throughout the state, and it gave a false impression of the attitude of the state bar toward the one-man grand jury, which actually is strongly favorable and not just narrowly so. If a dozen more members had weakened late in the afternoon and gone out for a breath of fresh air, the vote would have gone the other way.

No criticism is intended of the conduct of the group of men who presented these resolutions. They, like all other Michigan lawyers, are active members of the State Bar, and were entirely within their rights both in presenting the resolutions and in voting on them, as well as in getting as large a representation of their group as possible out to the meeting. Nor do we offer much of a reprimand to the hundreds of lawyers who came to hear Justice Bushnell and then left. These are crowded days for all of us, and they undoubtedly had work to do which they felt they could not afford to leave. Those in the corridors, we concede, ought to have been in there where they belonged, but their numbers were not very large. Our criticism is of the system that permits a haphazard group of a few hundred people, very easily dominated by a pressure group with an axe to grind, to speak authoritatively for the bar of any state.

The remedy for this situation is the house of delegates system, developed by the American Bar Association ten years ago and already adopted by several progressive state bar organizations, both integrated and unintegrated. In the American Bar Association, provision is made for the representation of all state bar organizations, local bar associations above a certain minimum size and national organizations in the legal profession, such as the American Judicature Society, in a house of delegates which is the Association's legislative and policy-making body. Expenses of the delegates to the meetings are paid by the Association. The result is that the Association's acts and policies are determined not by a heterogeneous assemblage of those who could afford to make the trip to the meeting, the local bar at the place of

the meeting, and, perhaps, supporters of some project brought in for the purpose of putting it through, but able men selected back home by the various state and local associations, who come to the meeting prepared to assume seriously the responsibilities of membership in it and thus as a group speak with some semblance of authority for the entire organized bar of the country.

It happens that the American Bar Association also has an assembly consisting of members present at the meeting, and that one of the assembly's few duties is the consideration of resolutions, so that the Detroit incident would not have been greatly different if the exact American Bar Association system had prevailed in Michigan at the time. The fundamental principle of the house of delegates, however, suitably adapted to the requirements of the individual state, is a needed reform in the structure of most of the state bar organizations of this country.

As practiced in California, Oklahoma, and certain other states, the house of delegates plan provides for subdividing the members into local organizations, usually on a county basis (in most instances existing local bar associations are satisfactory for the purpose), each of which elects a certain number of delegates to the state meeting, the number of delegates being in proportion to the number of lawyers in the unit. In a state bar house of delegates, representation might be accorded to such organizations as the Circuit Judges' Association, the Attorney-General's department, the Supreme Court, and any other appropriate organizations in the legal profession within the state. The adoption of such a system would mean that the members of the bar in the more remote and outlying sections of a state would be assured an adequate voice in the affairs of the organization, since the annual meetings are normally held in the thickly populated districts. It would also avoid giving a preponderant vote to the local bar of the city where the convention is held, and it would, of course, effectually prevent any pressure group from swamping the meeting by force of numbers and putting through measures not supported by the state bar as a whole.

The delegate principle has its counterpart in our state and national government. It is preposterous to imagine the affairs of the nation or of a state being conducted by a large "town meeting" held in Washington or Lansing, attended by such citizens as chanced to show up. Indeed, it is the principle of representative government that has made possible at all the extension of democracy to the government of states and nations as well as small individual communities. It is high time to extend the use of this device in the government of the organized bar.

Preview of the A.B.A. Convention Program

In addition to the luncheon meeting of the American Judicature Society Tuesday noon, December 18, to be addressed by Former Governor John W. Bricker of Ohio, numerous other events on the program of the American Bar Association's annual meeting at Cincinnati this month will be of interest to students of judicial administration.

The American Judicature Society will join with the Section of Judicial Administration and the Traffic Court Committee of the Junior Bar Conference of the American Bar Association in a session Tuesday morning, December 18, beginning at 9:30, featuring reports on model legislation for an administrator for the state courts by Chief Justice Robert G. Simmons of Nebraska, improvement in traffic courts by Earle W. Frost of Kansas City, and improvement in justice of the peace courts by Chief Justice Phil S. Gibson of California.

At an afternoon session the same day, beginning at 2:30, under the joint sponsorship of the Section of Judicial Administration, the Section of Criminal Law, and the American Judicature Society, there will be a report and discussion of the work of the Committee on Improvement in Criminal Procedure of the Section of Judicial Administration in shaping the new federal rules of criminal procedure into a pattern for similar improvements in state criminal procedure.

Other recommended addresses and reports of special and general interest follow:

The Ross contest prize essay, "The Development of the Doctrine of *Stare Decisis* and the extent to which it should be applied," by Robert A. Sprecher, Wednesday, December 19, at 9:30 a.m.

Presentation of awards of merit to state and local bar associations, Thursday, December 20, at 9:30 a.m.

Addresses and reports by Droward V. Sandifer on the United Nations charter, by Col. Archibald King on the problems presented by the atomic bomb, by James Oliver Murdock on pacific settlement of international disputes, and by George A. Finch on punishment of war criminals, in the Section of International and Comparative Law, Monday, December 17, at 2:00 p.m., and addresses by President David A. Simmons on the Association's interest in the United Nations charter, by Honorable Robert A. Taft on the authority of the American representative on the Security Council, and by Honorable Green H. Hackworth on the International Court of Justice, at that Section's luncheon, Wednesday, December 19, at 12:30 p.m.

Ten-Year Record of Pre-Trial in Detroit

The results of the pre-trial procedure developed in the Wayne County (Michigan) Circuit Court are very striking. Of the cases ready for trial, the following percentages were finally disposed of on the pre-trial hearing each year without any trial:

Year	Total ready for trial	Disposed of by trial	Disposed of on pre-trial hearing	Percentage disposed of on pre-trial hearing
1935....	4,965	2,949	2,016	40.6
1936....	5,834	2,948	2,886	49.5
1937....	5,798	2,600	3.198	55.1
1938....	5,839	2,306	3,533	60.5
1939....	5,752	2,436	3,316	57.6
1940....	5,156	1,844	3,312	64.2
1941....	3,419	1,561	1,858	54.3
1942....	4,957	1,891	3,066	61.9
1943....	5,347	2,550	2,797	52.3
1944....	5,501	2,478	3,023	54.95
Total ...	52,568	23,563	29,005	55.2
Average.	5,257	2,356	2,901	55.2

In Wayne County in 1944 only 2,478 cases were tried out of a total of 19,977 disposed of, or 12.4 per cent, while in all of the circuits outside of Wayne County 4,926 cases were tried out of 23,006 disposed of, or 21.4 per cent. Since the Wayne circuit court is the only court in the state which employs pre-trial procedure in all cases, it seems fair to conclude that the small proportion of cases tried is due in substantial part to the use of this device.

The manifest advantages of this practice ought to bring it into more general use throughout the state. *No express authorization by statute or Supreme Court rule has ever been required, but only a local rule promulgated by the circuit court.—Fifteenth Annual Report, Judicial Council of Michigan.*

Mimeographed Record on Appeal Authorized in Fifth Federal Circuit

Following is the text of a rule recently adopted by the Fifth Circuit Court of Appeals permitting the use of mimeographed instead of printed records on appeal:

"In lieu of having the record printed under Subsections 3 and 10 of Rule 23, counsel for appellant may at his option have the record produced by the multigraph duplicator or mimeograph method (must be clear and readable), and file in this Court ten copies of the record, one of which shall be duly certified under the hand and seal of the clerk of the district court. The record thus produced must be on opaque and unglazed paper, size 8½ by 11 inches, with a 1½ inch margin, neatly stitched on the left hand side and with a thick cardboard cover on both front and back. No volume shall contain more than 300 pages. Counsel for appellant shall serve opposing counsel with three copies of said record and file his certificate with the clerk of this court as to such service."

This rule will save litigants thousands of dollars every year, remarks the *Texas Bar Journal*, if the bar will take advantage of it. It will be possible for the court reporter to transcribe his notes directly on stencil and run off the necessary number of copies directly therefrom.

Michigan State Bar Proposes Changes in One-Man Grand Jury Statute

A resolution recommending the enactment of legislation to disqualify a judge sitting as a one-man grand jury from acting as examining magistrate or trial judge in the case of any person arrested as a result of his grand jury activities was adopted by the State Bar of Michigan at its annual meeting in Detroit last October 31. At the same time, another resolution asking the

organization to take a stand against the one-man grand jury itself was tabled.

No one-man grand jury has ever presided at the trial of defendants indicted by him, but there have been numerous instances of his acting as examining magistrate in such cases. The one-man grand jury statute is to be found in Michigan Statutes, Annotated, Section 28.943-6. Its history has been reviewed, and its advantages and disadvantages discussed, in two recent articles in the JOURNAL (28 J. Am. Jud. Soc. 137, Feb., 1945; 29 J. Am. Jud. Soc. 20, June, 1945).

Texas Judicial Council Makes Progress

The Texas Civil Judicial Council (so called because it lacks authority to deal with criminal procedure) has been working for years on a proposal to unify the courts of Texas. A discussion of its work up to that time was printed in this JOURNAL in June, 1944. At a meeting in October, the Council came close to agreement upon all but a few points in the proposed plan, and ordered another meeting in January to consider a redraft incorporating changes just made and which may very well result in adoption of a plan in final form. Among the topics considered at the October meeting were the following:

Selection of judges—A plan based upon the suggestions of Albert Kales as recommended a few years ago by the American Bar Association, was approved. Vacancies would be filled by appointment by the Supreme Court from a panel of three names submitted by nominating committees representing the bar and the public, incumbents to go before the voters at six year intervals without competition on the ballot.

Judicial salaries—Maximum salaries of $12-000 for judges of the Supreme Court and Court of Criminal Appeals; $10,000 for judges of the Courts of Civil Appeals, and $6,000 for district judges were recommended.

Retirement of judges—Voluntary retirement at 70 and compulsory retirement at 75 was proposed, with half pay for those with ten years or more of service, subject to assignment on special occasions by the Supreme Court.

Unanimous verdicts—The Council declined to approve majority verdicts, but agreed that as many as three of twelve jurors might be excused after selection without impairing the verdict.

Oklahoma Bar Association Declines to Abolish House of Delegates

A resolution and set of by-laws sponsored by the Oklahoma County delegation at the recent annual meeting of the Oklahoma Bar Association to abolish the Association's House of Delegates and substitute free voting by the general membership on the convention floor was withdrawn when after discussion it appeared that defeat was inevitable.

The by-laws of the Oklahoma Bar Association provide that the House of Delegates shall be composed of one delegate from each county of the state, provided that in every county where the active resident members of the bar shall exceed fifty such county shall be entitled to one additional delegate for each additional fifty or major fraction thereof, up to a maximum of ten delegates.

It was argued that steps should be taken to give the smaller counties a voice in the conduct of the State Bar's business, but a judge from one of the country counties spoke in vigorous defense of the delegate system, pointing out that prior to its institution the organization was controlled by the lawyers from the two large cities and that the chief purpose and function of the House of Delegates was to give the country lawyers a voice in the organization's affairs which they had not previously been getting.

At the conclusion of the discussion, the sponsors of the measure, representing the state's largest city, withdrew the proposal and left it to lie on the table until the next meeting.

Notes from Exchanges

Out of fifty jurors on our September, 1945, list, thirty-nine are "at home" or "housewives." Without casting any aspersions on our women folks, we must frankly confess that such a list comprises a list of one's peers involving domestic affairs, but not a cross section of our populace. Very few of our trials involve domestic matters; and while we have great love for our women folks, we must frankly admit that in the main their knowledge of business matters is limited. How many of us seek counsel of our wives in our business problems? Women folks generally form impressions at an early stage of trial and from that point on their minds are

made up, and no charge of law or other incidents transpiring at the trial will change their opinion. We should have women on juries, but at least they should be in proportion to the number of men serving.—*Cumberland County Bar Association Bulletin*, in the *New Jersey Law Journal*.

Your committee observes that more states are falling into line in the integration of the bar, either by rule of court or by legislative action, and are finding it decidedly advantageous to the profession, and your committee therefore suggests that the matter again be given consideration by members of this Association.—*Report of Committee on Judicial Administration and Legal Reform, Ohio State Bar Association*, in the *Ohio Bar Association Report*.

A new course in legal bibliography, research and writing to help future lawyers find their way through the huge and growing masses of federal and state laws, municipal ordinances, judicial decisions and federal regulations has been started at the School of Law of Western Reserve University, it was announced by Fletcher R. Andrews, professor of law, who organized the course and put it into effect.—*Ohio Law Reporter*.

The following resolution was adopted by the Oregon State Bar at its recent convention:

Be it resolved by the Oregon State Bar that it is the sense of this assembly that an examination or examinations for practice in Oregon be held prior to the regular annual examination for the purpose of enabling candidates returning from service in the armed forces to more expeditiously qualify themselves for practice, such additional examinations to be held at such times as the Board of Examiners may determine.—*Oregon State Bar Bulletin*.

The three-point program of the current administration of the Florida State Bar Association, as announced by Julius F. Parker, president is: 1. Revision and modernization of rules of civil procedure. 2. Formulation of some system by which lawyers may keep their own houses in order. 3. An increase in membership of the Association in areas in Florida where the membership has been small and the Association's influence insignificant.—*Florida Law Journal*.

The Literature of Judicial Administration

BOOKS

Recent Trends in English Precedent, by Julius Stone. Sydney, Australia: Associated General Publications Pty. Ltd., 1945. Paper, 76 pp. $2.25.

A small volume based on a series of lectures delivered in May, 1945, at the invitation of the Law Committee of New South Wales, to members of the profession returned from war service, as part of the Reconstruction Training Scheme. This will eventually be one chapter of a forthcoming book, *The Province and Function of Law*. The author is a member of the law faculty of the University of Sydney, and was at one time assistant professor of law at Harvard Law School.

The book will be of interest not only as a survey of current developments in English law (and it also contains a comparative introduction on the civil law), but also by way of noting what our brethren of Australia are doing for the returning veterans in what we call "refresher courses."

A Guide to Material on Crime and Criminal Justice, prepared by Augustus Frederick Kuhlman, for the Committee on Survey of Research on Crime and Criminal Justice of the Social Science Research Council. New York: H. W. Wilson Co., 1929. Cloth, 633 pp.

Bibliography of Crime and Criminal Justice, 1927-1931, compiled by Dorothy Campbell Culver, for the Bureau of Public Administration, University of California. New York: H. W. Wilson Co., 1934. Cloth, pp. xl and 413.

Bibliography of Crime and Criminal Justice, 1932-1937, compiled by Dorothy Campbell Culver, for the Bureau of Public Administration,

University of California. New York: H. W. Wilson Co., 1939. Cloth, pp. xxxi and 391.

These three volumes together provide a comprehensive, authoritative, fully annotated bibliographical guide to all important American and many foreign books, pamphlets, monographs and periodical articles relating to the administration of criminal justice, criminal procedure, crime prevention and related topics, from 1800 through 1937. Of the 36,000 bibliographical references in the three books, about 4,000 deal with more general topics in the field of judicial administration, such as court organization, selection and tenure of judges, judicial salaries, legal aid, and others. These are well indexed, easily accessible and usable, and make the set of books of much broader interest than their titles would indicate. Originally priced at $12.00 for each volume, the set of three may now be purchased for only $5.95 from Dover Publications, 1780 Broadway, New York 19, N. Y. This is a golden opportunity to acquire an invaluable research tool of permanent value at a small fraction of its original cost.

ARTICLES

Legal education and admissions to the bar of war veterans. Joseph A. McClain, Jr. 31 A. B. A. J. 510-13, October, 1945.

The law review should become the law school. Howard C. Westwood. 31 Va. L. Rev. 913-9, September, 1945.

The law schools, the law reviews and the courts. Lyman P. Wilson. 30 Cornell L. Q. 488-501, June, 1945.

The field of criminal law. George S. McCarthy. 8 Texas B. J. 497 (6 pp.), November, 1945.

The unauthorized practice of law. John Clark FitzGerald. 19 Conn. B. J. 234-9, October, 1945.

The unauthorized practice of law—activities of the state bar association. Warren H. Resh. 1945 Wis. L. Rev. 163-180, March, 1945.

The young lawyer and his profession. Selden F. Waldo, 19 Fla. L. J. 276-9. November, 1945.

The statute of the international court of justice. 31 A.B.A.J. 400-406, August, 1945; 19 Conn. B. J. 290-308, October, 1945.

A study of pendency in Texas civil litigation. Robert W. Stayton and M. P. Kennedy. 23 Texas L. Rev. 311-46, June, 1945.

The development of the doctrine of *stare decisis* and the extent to which it should be applied. Robert A. Sprecher. 31 A.B.A.J. 501-509, October, 1945.

Jury trial in France. Morris Ploscowe. 29 Minn. L. Rev. 376-86, May, 1945.

CASES

Daitz Flying Corp. v. *United States*,—F. Supp.—, U. S. District Court, Eastern District of New York, 1945, Moscowitz, J.—Agreements and admissions made by counsel for the United States at a pre-trial conference held binding against the United States. *Wallace v. U. S.*, 142 F. 2d. 240, holding attorneys without power to waive any defense which the United States might have, declared not applicable.

All the law in the world has been obtained by strife. Every principle of law which obtains had first to be wrung by force from those who denied it; and every legal right—the legal rights of a whole nation as well as those of individuals—supposes a continual readiness to assert it and defend it. The law is not mere theory, but living force. And hence it is that Justice, who in one hand holds the scales in which she weighs the right, carries in the other the sword with which she executes it. The scales without the sword is the impotence of law. The scales and the sword belong together, and the state of the law is perfect only where the power with which Justice carries the sword is equalled by the skill with which she holds the scales.—*Rudolph von Jhering.*